

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15/06/2004

CORAM

The Honourable Mr. Justice V. KANAGARAJ

Second Appeal No.726 of 1993

and

C.M.P.No.13116 of 1993

1. Ayyanar Raja
2. Velayuthan Raja .... Appellants

-Vs-

Periya Thalaimalaiyan ....Respondent

Second Appeal preferred under Section 100 C.P.C., praying for the relief as stated therein.

!For Appellant : Mr. S. Sundaragopal

^For Respondents : Mr. P.Mathivanan

:J U D G M E N T

This Second Appeal is preferred against the judgment and decree dated 17.03.1993 made in A.S.No.62 of 1991 on the file of the Court of Subordinate Judge of Srivilliputhur, thereby reversing the Judgment and Decree dated 16.04.1991 made in O.S.No.183 of 1988 on the file of the Principal District Munsif, Srivilliputhur.

2. Tracing the history of the above second appeal coming to be preferred by the defendants in O.S.No.183 of 1988, it comes to be known that the plaintiff/respondent has filed the suit for bare injunction. The suit I schedule property, which belonged to the defendants was acquired by the Government for the purpose of Harijan Welfare and allotted to the landless persons by an award No.11 of 1965 dated 08.10.1965; that the amount for the land was also deposited in the Court; that the II schedule property is a part of the I schedule property; that the Tahsildar has granted patta in favour of the plaintiff in respect of the II schedule property on 29.12.1965; that on that day onwards he is the owner of that property; that in the meantime, the plaintiff has proposed to construct a house in the land, the defendants had filed a suit in O.S.No.212 of 1979 on 7.4.1979 and obtained an order of interim stay; that in that petition the defendants have not mentioned the acquisition made by the Government; that thereafter the suit was settled out of Court; but the plaintiff did not know about the result of the case; that

again during 1982 the plaintiff has proposed to construct a house in the land, the defendants have obstructed the plaintiff to construct a house. Hence, the plaintiff has filed the suit.

3. The second defendant has filed the written statement and the first defendant has adopted the same and raised the contentions that the suit is not maintainable either in law or on facts and has to be dismissed in limine; that the first schedule property was acquired from several individual persons by the Government for the purpose of Harijan Welfare, which was not known by the first defendant; that the first schedule property was purchased by their father and till date the defendants are in possession and enjoyment of the property; that the defendants did not know that the second schedule property is a portion of the first schedule property and the Government has acquired the property; that the Government did not issue notice to the defendants about the acquisition; that the plaintiff is not entitled to the property at any point of time; that the plaintiff did not mention the area and portion of the property in the suit; that the plaintiff has not impleaded the Government as a party in the suit. Hence, the plaintiff is not entitled to any relief in this suit.

4. The second defendant has filed additional written statement and raised the contention that the plaintiff has never enjoyed the suit property; that the defendants did not know that the Tahsildar has granted patta to three cents land in favour of the plaintiff; the suit property was purchased by their father Subburaja on 2.1.1960 from Kandasamy Raja by a registered deed; that the defendants father had in possession and enjoyment of the suit property from the date of purchase and after his death, the defendants are in possession and enjoyment of the suit property by constructing a hut; that the hut was damaged, and therefore the defendants are enjoying the property by dubbing waste materials; that the defendants have paid the municipal tax etc. that the Government has not acquired the property of the defendants; that the plaintiff has not mentioned the boundaries and area in the suit. Hence, the suit has to be dismissed with costs.

5. The Court of District Munsif, Srivilliputhur having traced the facts and circumstances of the case as pleaded by parties and framing three issues and one additional issue, namely,

i) whether regarding the second schedule of suit properties, the plaintiff is entitled to permanent injunction?

ii) Whether the suit is not maintainable since the Government is not made as a party to the proceeding?

iii) What other relief is the plaintiff entitled to?

iv) Whether the suit property and the property claimed by the defendants are one and the same?

has ordered the trial during which the plaintiff would examine himself as the sole witness P.W.1 and on the part of the defendants, the second defendant would examine himself as the sole witness D.W.1 for oral evidence and for documentary evidence, the plaintiff marked four documents as Exs.P1 to P4; Ex.P1 dated 29.12.1965 being the assignment order issued to the plaintiff by the Special Tahsildar; Ex.P2 dated 13.11.1980 being the judgment in O.S.No.212 of 1979 on the file of the Court of District Munsif, Srivilliputhur; Ex.P.3

dated 27.2.1979 being a representation given to the Special Tahsildar and Ex.P4 being the order copy of the Special Tahsildar passed in Ex.P3 representation.

6. So far as the defendants are concerned, they have marked 10 documents as Exs. D1 to D10; Ex.D1 dated 2.1.1960 being a sale deed for a sum of Rs.100/- in favour of Subburaja and Kandasamy Raja; Exs.D2 and D3 being the copies of the demand register; Ex.D4 dated 5.3.1991 being the sketch for Town Survey No.42; Ex.D5 dated 05.03.1991 being the copy of the Field Measurement Book for the said Survey Number; Ex.D6 dated 03.02.1988 being the copy of the patta for Survey No.42; Ex.D7 dated 30.03.1990 being the Kist receipt; Ex.D8 dated 26.9.1990 being the property tax demand notice; Ex.D9 dated 04.10.1990 and Ex.B10 dated 27.2.1991 being the kist receipts.

7. The trial Court then appreciating the above evidence issue wise would ultimately dismiss the suit, challenging which, the plaintiff in the suit preferred an appeal in A.S.No.62 of 1991 before the Court of Subordinate Judge, Srivilliputhur, and the said Court also tracing the facts as pleaded before the trial court and framing the points for consideration, whether the judgment and Decree of the Court below has to be sustained or not?, and what relief the appellant/ plaintiff is entitled to? and appreciating the evidence placed on record by the trial Court, would find that based on the documents relied upon by the plaintiff that the Government had acquired the suit property and had allotted the same to the plaintiff; that the defendants had not filed any petition against that acquisition; that Exs.D 7, 9 and 10 and Ex.D8 kist receipts, property tax receipt have been obtained only after filing of the suit by them and hence these exhibits are in no way going to develop the case of the defendants; that the documents produced by the plaintiff and the oral witness adduced by him as a witness go a long way to prove the case of the plaintiff against the defendants and would decide that the defendants are not in a position to establish their case to the effect that the plaintiff is not the owner of the suit property and thus on a overall consideration on the points framed, the appellate court would ultimately arrive at the conclusion to allow the appeal, thereby reversing the judgment of the lower court.

8. It is only against these reversed judgments delivered by both the trial court and the first appellate court, the defendants in O.S. No.183 of 1988 have come forward to prefer the above second appeal on certain grounds as brought forth in the grounds of second appeal and on the following substantial questions of law:-

- "i) Whether in the facts and circumstances of the case, the lower Appellate Court misdirected itself in deciding the question of the defendants title and possession?
- ii) Whether the suit for bare injunction when the title is in dispute is maintainable?
- iii) Whether the lower Appellate Court is right in holding that the plaintiff is entitled for injunction overlooking his admission that he is not in possession of the suit property and not paid any tax?
- iv) Whether the lower Appellate Court can reject the

Commissioner' s report and give different finding in a suit for injunction?"

9. During arguments, the learned counsel appearing for the appellants and the respondents as well would dwell on facts which have already undergone many dissections which have been traced here before, the learned counsel for the appellant stating that the suit property is a house property measuring three cents assigned by the Government in the year 1965 and the suit has been filed after an inordinate delay of 23 years in the year 1988 and the defence is that the defendants are in possession of the suit property by dubbing waste materials. The learned counsel would also cite Order 7 Rule 3 of the Civil Procedure Code which postulates that "Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers" and commenting that no proper description of the suit property has been offered specifying the boundaries sufficient to identify the same and, therefore, on such arguments would pray to allow the appeal setting aside the judgment and decree passed by the first appellate Court.

10. In reply the learned counsel appearing for the respondent would lay emphasis on the Government assignment made in favour of the respondent as early as on 29.12.1965 itself, that the defendants have, now contending that they are in bare possession of the suit property by dubbing waste materials have come forward to resist the suit; that based on Ex.P1 assignment and Ex.P3 representation, which had been given to the special Tahsildar, Adi Dravidar Welfare for which suitable reply has been given in Ex.P4 would reveal that there is a definite case of the respondent in which the appellants with certain documents, which have been created after the assignment was made in favour of the plaintiff, could not claim any right to the suit property. According to the learned counsel, the suit property has been sufficiently described and there is no ambiguity regarding the description of property, which has been identified by the first appellate Court and, therefore, it is not a case, which is falling under Order 7 Rule 3 of the Civil Procedure Code and would pray to dismiss the above second appeal.

11. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both as above, if a decision has to be arrived at by this Court adhering the substantial questions of law framed, which are four in number which could be easily answered in the following manner.

12. So far as the first substantial question of law is concerned, based on Exs.P1 to P4 placed on record, which are the Government assignment and orders passed and, therefore, so far as the title is concerned, there is no doubt about the genuineness of the case of the plaintiff. Regarding question of possession, it is the suit property as a vacant site in which the plaintiff claims that he has put up a hut, but the defendants would claim that there had been previously a house, which got demolished and, therefore, they are making use of the same for dumping waste materials. However, even if it has to be taken as none of these activities are going on

in the piece of land, which is the suit property measuring three cents, it could be presumed that it is a vacant house site where no permanent immovable structure has been built by any of the parties and since being a vacant site, the code to decide possession is that possession follows title and, therefore, since the title of the respondent/plaintiff is clear by the assignment of the said land in his favour by the Government, it has to be concluded that the respondent is in possession of the suit property by virtue of being the lawful owner of the same and therefore, the first substantial question of law has to be decided only against the appellants and the same is answered accordingly.

13. So far as the second question of law that whether bare injunction would sustain when the title itself is in dispute, it could very well be answered that while there is no dispute for title so far as the case in hand is concerned, the plaintiff having coming forward to file a suit for bare injunction, since according to him, the defendants are obstructing him from enjoying the suit properties and, therefore, the suit is very well maintainable. The second substantial question of law is answered in this manner.

14. So far as the third question of law is concerned, in view of the answer made to the first and second substantial questions of law, the question of the plaintiff not being in possession of the suit property in the name of admission nor regarding the non-payment of tax do not arise at all. So far as the last substantial question of law is concerned that the lower appellate Court is having the authority to decide the Commissioner's report and since the commissioner's report is not to the expectations of the Court, the lower appellate Court is fully justified in dissecting the commissioner's report and, such an act of the Court cannot be a stumbling block for the Court to arrive at its own conclusions and therefore, the substantial questions of law No.3 and 4 are also to be decided only against the appellants and same are decided accordingly.

In result,

- i) the above Second Appeal does not merit acceptance, but only become liable to be dismissed for the foregoing reasons assigned and the same is dismissed accordingly;
- ii) the judgment and decree dated 17.03.1993 made in A.S.No.62 of 1991 on the file of the Court of Subordinate Judge of Srivilliputhur is hereby confirmed;
- iii) consequently, C.M.P.No.13116 of 1993 is dismissed and C.M.P. No.13117/93 is close.
- iv) however, there shall be no order as to costs.

Index:Yes

Internet:Yes

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To

1. The Subordinate Judge, Srivilliputhur
2. The Principal District Munsif, Srivilliputhur.

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